# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| Argument | 9 |
| Conclusion | 24 |


## CITATIONS

Cases:


| | |
|---|---|
| *Allen* v. *United States*, 4 F. 2d 688, certiorari denied, 267 U.S. 597 | 23 |
| *Finnegan* v. *United States*, 204 F. 2d 105, certiorari denied, 346 U.S. 821 | 21 |
| *Greater New York Live Poultry C. of C.* v. *United States*, 47 F. 2d 156 | 19 |
| *Holt* v. *United States*, 218 U.S. 245 | 23 |
| *Hornstein* v. *Paramount Pictures, Inc.*, 292 N.Y. 468 | 17 |
| *Ladner* v. *United States*, 168 F. 2d 771 | 11 |
| *Nick* v. *United States*, 122 F. 2d 660, certiorari denied, 314 U.S. 687 | 12, 13, 19 |
| *Paschen* v. *United States*, 70 F. 2d 491 | 23 |
| *People* v. *Barondess*, 133 N.Y. 649 | 14 |
| *People* v. *Bernoff*, 292 N.Y. 230 | 14 |
| *People* v. *Feld*, 262 App. Div. 909 | 17 |
| *People* v. *Hughes*, 137 N.Y. 29 | 14 |
| *People* v. *Lamm*, 292 N.Y. 224 | 14 |
| *People* v. *Rosenzweig*, 265 N.Y. 323 | 14 |
| *People* v. *Warden of City Prison*, 145 App. Div. 861, affirmed, 206 N.Y. 632 | 14 |
| *People* v. *Weinseimer*, 117 App. Div. 603, affirmed, 190 N.Y. 537 | 14 |
| *People* v. *Wilzig*, 4 N.Y. Crim. 403 | 14 |
| *Shockley* v. *United States*, 166 F. 2d 704, certiorari denied, 334 U.S. 850 | 23 |

Cases—Continued

Page

*Shushan* v. *United States*, 117 F. 2d 110, certiorari denied, 313 U.S. 574 ..... 23
*United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395 ..... 21
*United States* v. *Compagna*, 146 F. 2d 524, certiorari denied, 324 U.S. 867 ..... 12, 13, 19, 21
*United States* v. *Green*, (D.C. No. 5236, decided January 24, 1955) ..... 11
*United States* v. *Local 807*, 315 U.S. 521 ..... 13, 19

Statutes:

Act of June 18, 1934, 48 Stat. 979, 18 U.S.C. [1940 ed.] 420a-420e ..... 12
Labor Management Relations Act, 61 Stat. 136, Section 302, 29 U.S.C. 186 ..... 15
Morris-LaGuardia Act, Act of March 23, 1932, Section 6, 47 Stat. 71, 29 U.S.C. 106 ..... 20
Hobbs Act, 18 U.S.C. 1951 ..... 2, 10, 13

Rules:

Rule 21(a), F. R. Crim. P. ..... 21, 22
Rule 31(c), F. R. Crim. P. ..... 18

Miscellaneous:

91 Cong. Rec. 11843 ..... 14
91 Cong. Rec. 11900 ..... 14
91 Cong. Rec. 11906 ..... 14
91 Cong. Rec. 11908 ..... 14
91 Cong. Rec. 11910 ..... 14
H. Rep. No. 238, 79th Cong., 1st sess., p. 10 ..... 13

# In the Supreme Court of the United States

OCTOBER TERM, 1954

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No. 646

CARL BIANCHI, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. 47-69) is not yet reported.

### JURISDICTION

The judgments of the court of appeals (Pet. 70-72) were entered on February 10, 1955. The petition for a writ of certiorari was filed on March 9, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether it is extortion within the meaning of the Hobbs Act, 18 U.S.C. 1951, for a labor union representative to obtain money for his own benefit from one who is induced to pay it by fear of economic injury.

2. Whether, in a prosecution under the Hobbs Act, it was error for the court to refuse a charge based on Section 302 of the Labor Management Relations Act of 1947, making wilful payments by employers to representatives of employees a misdemeanor.

3. Whether it was proper to admit testimony by the persons from whom money had been extorted as to the fears that motivated the payment.

4. Whether Section 6 of the Norris-LaGuardia Act applies to criminal prosecutions against union representatives who are charged as individuals with extortion under the Hobbs Act.

5. Whether the trial court abused its discretion in refusing to grant either a change of venue or an indefinite continuance because of alleged local prejudice.

## STATUTE INVOLVED

18 U.S.C. 1951 provides in part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in

furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Pertinent provisions of the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. 151 *et seq.*) and the Norris-LaGuardia Act (47 Stat. 71, 29 U.S.C. 106) are set forth in the Argument, *infra*, pp. 15, 20.

STATEMENT

In the United States District Court for the Eastern District of Missouri, a jury found petitioners guilty on the first two counts of a three-count indictment charging violations of 18 U.S.C. 1951 (R. 1-6). Count 1 charged a conspiracy to obstruct,

delay, and affect interstate commerce by extortion, and Count 2 the substantive offense of obstructing, delaying, and affecting interstate commerce by extortion. Each of the petitioners was sentenced to 10 years' imprisonment on Count 1; on Count 2 imposition of sentence was suspended and petitioners were placed on probation for a period of five years to run consecutively with the term of imprisonment (R. 587-591). On appeal, the judgment was unanimously affirmed (Pet. 69).

The evidence for the government may be summarized as follows:

At all times involved, petitioners were representatives of labor unions in the St. Louis area—Bianchi for the Operating Engineers, Poster for the Laborers (R. 258), and Thompson for the Teamsters (R. 408).

The Trojan Construction Company, a corporation engaged in general pipe line construction with principal offices in Oklahoma City, Oklahoma (R. 221), entered into a contract in June 1950, to reclaim pipe from an abandoned oil pipe line in St. Louis County (R. 221, 302, 303, 352; Gov. Ex. 26). The reclaimed pipe was subsequently reconditioned and shipped out of Missouri (S.R. 6; Gov. Ex. 27). Work on the contract was completed in November 1950 (R. 221). Late in July 1950, in advancing along the pipe line right of way, the Trojan work crews came within the geographic jurisdiction claimed by the St. Louis locals (R. 221).

In November 1951, the Trojan Company, pursuant to a contract with a subsidiary of the Phillips Petroleum Company, began constructing in the State of Missouri two loops of pipe, of about 40 miles, to be tied into a main pipe line used for transporting refined petroleum products from Border, Texas to East Chicago, Indiana (R. 266, 268). Since the compensation to Trojan was based on a specific cost per linear foot, every day that the Trojan employees could work was beneficial to the construction company, while every day that Trojan employees could not work would cost the company fifty percent (50%) of what an operating day would cost (R. 258, 259).

On both contracts, Trojan used equipment brought into Missouri from out of the state (R. 270; S.R. 91-105). It employed members of three different craft unions, *viz.*, laborers, teamsters, and operating engineers (R. 222), some of whom had been hired in Oklahoma (R. 287, 294, 296).

Around August 1, 1950, petitioners met the president and secretary of the Trojan Construction Company at a St. Louis hotel (R. 222). They demanded to know what the company meant by coming into the area without making a deal with them (R. 259, 260). When Felix Johnson, the secretary of Trojan, said that the company was operating under national agreements with the craft unions employed and would make arrangements with petitioners in accordance with the national agreement, petitioner Bianchi stated, "Well, if you are going to work in this territory, you are going to work our way, because we do not believe in the national

agreement." (R. 259-260.) Petitioners demanded that Trojan employ men associated with the St. Louis locals as long as it worked in the St. Louis area (R. 222,223).

Shortly after August 1, 1950, petitioners met with a partner in the company which had engaged Trojan to reclaim pipe line for it and said that they were going to shut down the job (R. 353). Referring to Trojan as "the Johnson boys," petitioner Bianchi said, "The Johnson boys are shut down. You better see the Johnson boys." (R. 353). On August 5, and 6, the vice president of Trojan reported to other officers of the company that union representatives (not petitioners) had told him they "had better shut our job down until we were straight with the union " (R. 271) and that "goon gangs" had run a foreman and welder off the right of way and told them there would be trouble if the job was not shut down (R. 272). All work on the pipe reclaiming project ceased on August 5, 1950 (R. 242).

On August 8, 1950, representatives of Trojan met with petitioners and other union representatives at the Statler Hotel in St. Louis (R. 223). During the meeting, Bianchi motioned for Felix Johnson, one of the company's representatives, to come with him and Thompson into the bedroom of the suite. Bianchi said they were not getting anywhere arguing about the matter and that he could "fix" the situation so that Trojan could get the job done. When Johnson asked what he meant, Bianchi said, "Well, we can arrange it so that

your men can come on through and work all three sections, including the termini territories, for a consideration." When Johnson asked Bianchi what he meant by a "consideration," Bianchi said it would cost 3 cents per foot of pipe taken out of the ground on the reclaiming project. Johnson remarked that this was a lot of money as it amounted to $150 per mile and there were approximately 90 miles of reclaiming work on the project, that he would have to talk it over with his associates. When Bianchi, Thompson, and Johnson returned to the living room of the suite, Bianchi told his associates that he thought he could get the matter settled if they would leave. They left. (R. 224.)

On August 9, 1950, Bianchi and Thompson came to Johnson's suite in the Statler Hotel. Johnson told them that the Trojan Company did not like the arrangement previously discussed but would go along on the payment of 3 cents per foot on the pipe taken out of the ground (R. 224-225). When Bianchi told Johnson that the payments must be in cash, Johnson replied that he had no way of getting that amount of cash out of Trojan Company, but that payments could be handled by invoice. Johnson said he would leave the arrangements to Bianchi. When Bianchi said he would have to have the money all at once, Johnson replied that Trojan was not able to make the lump sum payments but would have to spread them out over a period of time while the project was in progress. Bianchi then told Johnson that the Trojan Company could start work at once. Petitioner Thomp-

son, who was present, nodded his head in agreement (R. 225).

The Trojan Construction Company resumed work on the pipe reclaiming project on August 11, 1950 (R. 225). Thereafter, Trojan paid one Al Fishel $11,250 for the rental of equipment which it did not use (R. 225, 335-336). It was understood between Fishel and petitioners Poster and Bianchi that rental payments from Trojan were to be applied on the purchase of this equipment and machinery at a price of $15,550 (R. 335-336). After arrangements were made by Bianchi and Poster to pay Fishel the balance due (R. 338-342), title to the equipment was taken by the Washington Equipment and Construction Company of which petitioners were shareholders (R. 310-315).

Around November 1, 1951, Felix Johnson, representing Trojan, had a pre-job conference with petitioners Bianchi and Thompson concerning construction of the two loop lines for the Phillips Company. Bianchi referred to the pipe reclaiming project and said that the Phillips project could be started off right. Johnson explained that Trojan had lost money on the previous job and that, due to the likelihood of inclement weather, time was of the essence in performing the Phillips contract. Bianchi told Johnson that Trojan could get started right away on this project, that there would be no labor trouble, and that it would cost $1,000 in cash for each labor craft involved (R. 227). When Johnson advised Bianchi that Trojan could not pay cash but could honor an invoice, Bianchi said

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he could take care of the teamsters and laborers and operating engineers by invoice, but that the other labor craft, the welders, would have to have cash. (R. 226-227.)

On or about November 15, 1951, Johnson paid Bianchi $1,000 in the form of ten $100 bills (S.R. 17). By check dated December 14, 1951, for $3,062.50, Trojan paid the Washington Equipment and Construction Company for rental of equipment (S.R. 33; Gov. Ex. 4), which it had never received or used (R. 350, 351, S.R. 32). Petitioners Thompson and Poster subsequently liquidated their holdings in the Washington corporation (R. 316; Gov. Exs. 37-38, S.R. 78-85).

Felix Johnson testified that the payments were made because the officials of Trojan were fearful of economic loss, injury to Trojan employees, and damage to Trojan equipment. (S.R. 37.) The vice president of Trojan testified that the company's decision to pay petitioners was due to fear of possible financial loss and for the purpose of avoiding damage to company equipment and injury to company employees. (S.R. 60.)

## ARGUMENT

This case is a classic example of extortion by union officials from an employer. Petitioners, far from using their power for the employees they ostensibly represented, threatened labor strife as the alternative to the exactions they demanded and received. As the jury and the courts below found, there was no semblance of a "labor dispute" in the record. At no time did the government's case in-

volve the validity of the union demands or the agreement between Trojan and the national unions. The payments to petitioners were made, not as a settlement of a union claim, but as tribute exacted. This is clear extortion under the statutory definition and as that term is commonly used.

1. Section (b)(2) of the Hobbs Act (*supra*, p. 3) defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Petitioners contend (Pet. 19-29) that the fear of economic loss occasioned by the threat of a prolonged labor shut-down is insufficient to make out a case of extortion under the statute unless accompanied by actual or threatened force or violence, even though the threat of a shut-down is used by a union representative merely as a means of personal enrichment. They argue that since they were not shown to have used actual or threatened violence in this case, there can be no Hobbs Act violation.

As the court below held (Pet. 52-57), there is no reason to construe the statute so narrowly, contrary to the plain meaning of the language used. If "fear" were used in the definition only in the sense of force and violence, there would have been no need to include this term in the definition of extortion, particularly since the statute refers to actual *or* threatened force and violence. To limit the term "fear" to that engendered by force and violence would drain the term of any independent

meaning. The word "fear" must therefore mean something different from fear of physical force and violence. That extortion may be predicated on compulsion other than physical force and violence is manifest from the definition itself, which provides that "color of official right" may serve as the compelling force. No showing of force and violence is required where the compulsion of official right is used. *Ladner* v. *United States,* 168 F. 2d 771 (C.A. 5). Since fear of economic injury can be as compelling as violence or color of office, there is no reason why the compulsion of such fear should not be sufficient to constitute extortion.

Such an interpretation of the word "fear" would not, as petitioners contend, make every interstate business or labor dispute subject to the Hobbs Act. The statutory definition relates to the "wrongful" use of fear. The threat to carry on activities, such as a strike, for a legitimate labor objective, even though it might involve the playing on fears of economic loss, would not be a "wrongful" use of fear, and would therefore not constitute an offense under the statute.[1] Moreover, the use of fear must

[1] A different problem is presented where the means used, such as force and violence, are themselves unlawful, even though the end sought may not be. That issue, which will be before this Court on a direct appeal by the government from a decision of the District Court for the Southern District of Illinois, *United States* v. *Green* (D.C. No. 5236, decided January 24, 1955), is not involved here since the purpose of petitioners' actions, to obtain money for themselves, is admittedly unlawful. Acknowledging the differences between the instant case and others under the Hobbs Act (Pet. 41), petitioners in effect recognize the fact that the *Green* appeal has no bearing on this case.

be to "extort", i.e., to obtain money or property, a factor which is not always present in such cases. The decisive point is that where, as here, the use of fear of economic injury is for a purpose clearly wrongful—the personal enrichment of labor representatives—there is a clear use of power to extort, and therefore a clear violation of the Hobbs Act.

Petitioners admit (Pet. 22-23) that, under the predecessor statute, the Anti-Racketeering Act of 1934,[2] which, *inter alia*, punished obstruction of interstate commerce through use of "force, violence or coercion", the use of fear of economic injury through threats of a labor shut-down by labor leaders for purposes of personal gain constituted coercion within the statute. *United States* v. *Compagna*, 146 F. 2d 524 (C.A. 2), certiorari denied, 324 U.S. 867; *Nick* v. *United States*, 122 F. 2d 660 (C.A. 8), certiorari denied, 314 U.S. 687. They argue, however, that the elimination of the word "coercion" from the Hobbs Act was designed to eliminate use of fear of economic coercion from the coverage of that statute. Neither the language nor the legislative history of the Hobbs Act supports this conclusion.

The 1934 Act had punished anyone who, in a matter affecting interstate commerce,

> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force,

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[2] Act of June 18, 1934, 48 Stat. 979, 18 U.S.C. [1940 ed.] 420a-420e.

> violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right * * *.

The Hobbs Act punishes anyone who obstructs commerce by robbery and extortion, and then defines robbery and extortion. In the amended statute, the prime purpose of which was to overcome the decision in *United States* v. *Local 807,* 315 U.S. 521,[3] Congress adopted an arrangement of the statute different from that of the predecessor, and numerous changes of phraseology occurred. But there is nothing to indicate that the changes in phraseology were designed to eliminate the use of fear of economic injury for personal gain as an act condemned by the statute. To the contrary, the

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[3] H. Rep. No. 238, 79th Cong., 1st sess., p. 10. In view of this primary purpose, it was natural that in debates, reference was made to the use of force, as had occurred in the *Local 807* case. Also, in view of the proposed elimination of the previous exemption granted to attempts to obtain "payment of wages," the proposed bill and its possible effects on labor disputes was of concern to labor leaders. But there is nothing to show any effort to obtain reversal of the *Nick* and *Compagna* holdings that payments to union representatives for personal enrichment was not payment of wages or to overturn the assumption of those cases that use of fear of economic loss constituted coercion.

legislative history clearly shows that the changes in phraseology were designed to make the statute conform to the standard definitions of the New York Penal Code, which had been followed by many states. Thus, Congressman Robsion of Kentucky stated, 91 Cong. Rec. 11906:

> The definitions of robbery and extortion set out in this bill are the same definitions set out in the New York State code of laws and are defined in substantially the same way by the laws of every State in the Union. Of course, it does not apply to any case where personal property of another person is taken lawfully, without force or violence or fear of injury.

See also 91 Cong. Rec. 11843, 11900, 11908, 11910. Before adoption of these definitions in the Hobbs Act, the courts of New York which had had occasion to construe the New York extortion statute had consistently ruled that the use of fear of economic injury to induce another to turn over money or property for the personal use of the one demanding it constituted extortion. *People* v. *Wilzig*, 4 N.Y. Crim. 403 (1886); *People* v. *Barondess*, 133 N.Y. 649 (1892); *People* v. *Hughes*, 137 N.Y. 29 (1893); *People* v. *Weinseimer*, 117 App. Div. 603 (1907), affirmed, 190 N.Y. 537 (1907); *People* v. *Warden of City Prison*, 145 App. Div. 861 (1911), affirmed, 206 N.Y. 632 (1912); *People* v. *Rosenzweig*, 265 N.Y. 323 (1934); *People* v. *Lamm*, 292 N.Y. 224 (1944), and *People* v. *Bernoff*, 292 N.Y. 230 (1944). Though each of the above cases was

surrounded by an atmosphere of labor discord, the courts readily separated extortion from the bona fide labor demands asserted by union officials and held that force and violence need not be shown to make out extortion in violation of the statute. The Hobbs Act, which adopted the New York definitions, should be construed in the same way. To require a showing of violence and force in order to prove extortion under the Hobbs Act would deny to interstate commerce the protection the Act affords. The use of power by labor union officials to enforce demands for personal tribute impairs the free movement of commerce as seriously as does the use of violence.

2. Section 302 of the Labor Management Relations Act (Taft-Hartley), 61 Stat. 136, 29 U.S.C. 186, provides in part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

Although the indictment in this case was laid under the Hobbs Act, petitioners requested the trial judge to instruct the jury on the elements

of the offense described in the Taft-Hartley Act, to explain the difference between bribery and extortion, and to charge that the jury could find petitioners guilty under the Taft-Hartley Act as a lesser offense included in the offense charged (R. 539-549). The judge did not give such instructions. He did, after summarizing the government's theory of the case (R. 513-514), summarize the defense theory that petitioners were legitimately negotiating a labor controversy (R. 514) and did charge that there was nothing in such a controversy over working conditions that violated the law on which the indictment was based (R. 515). In describing the elements of the offense charged in the indictment, the judge told the jury that they must find, *inter alia,* that petitioners "made express or implied threats * * * that industrial strife would ensue" unless their demands for money were complied with, and that they "made such demands for money for their own personal profit and not in the interests of the members of their respective unions" (R. 521). He further charged (R. 526):

> The mere receipt of money or anything of value by a labor representative of employees from the employer of such employees is not of itself sufficient to constitute an offense under the indictment; but before you can convict any defendant under this indictment it is incumbent upon the Government not only to prove beyond a reasonable doubt that each defendant received or agreed to receive from Felix John-

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> son money or other things of value, but they must go further and prove beyond a reasonable doubt that the defendants committed some acts, the likely effect of which would be to induce fear in Felix Johnson, and if the Government fails to prove fear, the defendants should be acquitted.

In the light of this charge, and the evidence in this case, there is no substance in petitioner's contention (Pet. 29-34) that it was error for the judge to fail to charge on the elements of the Taft-Hartley Act and to permit conviction thereon as a lesser included offense. As petitioners themselves state, the Taft-Hartley offense relates essentially to bribery, and bribery and extortion are mutually exclusive. If the employer paid the money as a bribe, petitioners could not have extorted it through fear. *People* v. *Feld*, 262 App. Div. (N.Y.) 909 (1941); *cf. Hornstein* v. *Paramount Pictures, Inc.*, 292 N.Y. 468 (1944). Petitioners did not, as did the defendant in the *Feld* case (*supra*), offer evidence to the effect that they had taken money as a bribe. There was thus no reason for the judge to charge on a defense not made. The judge did charge in the portion quoted above that the mere receipt of money by a labor leader did not constitute the offense charged in the indictment. He also charged that, before petitioners could be found guilty, the jury had to find that they made threats for the purpose of extorting money for themselves. This charge related to the acts of the petitioners, not the state of mind of the employers, so that peti-

tioners are in error in saying (Pet. 33) that the difference in the offenses can turn on the timidity of the victims. As the judge correctly charged, petitioners were guilty under the Hobbs Act only if they themselves used fear to extort. Since the judge correctly charged on all the elements necessary to convict, he was not required to charge on the elements of some other offense not charged and therefore not before the jury for consideration.

Because of the totally different theories underlying bribery and extortion, violations of Section 302 are not lesser offenses included within violations of the Hobbs Act. Before an offense can be viewed as an included offense under Rule 31(c), F.R. Crim. P., it must necessarily be committed in the perpetration of the larger crime. The test is whether an acquittal on the one will bar a subsequent prosecution on the other. In this case, since the elements of the offense are different, an acquittal of extortion under the Hobbs Act, because of failure to prove that petitioners obtained money from their victims by unlawful use of fear, would not bar a subsequent prosecution for violation of Section 302. An offense completely inconsistent with the offense charged cannot be a lesser included offense.

3. Petitioners also contend (Pet. 34-37) that the trial judge erred in permitting representatives of Trojan to testify that they paid the money because of fear, not only of economic loss, but of injury to person and property, and in not withdrawing the issue of physical violence from the jury. As we

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have shown in point 2, however, the jury were told that in order to convict they must find that the defendants made threats which were intended to cause fear in the minds of Trojan, so that the jury could not have based the conviction merely on the mental state of the employer. And, as the court below points out (Pet. 65), the emphasis throughout the charge was on the fear of economic loss occasioned by the threat of a prolonged labor dispute (*e.g.*, "fear that work on the project would not go forward" (R. 514); "that the work would not otherwise proceed" (R. 516); "threats * * * that industrial strife would ensue" (R. 521); fear that "their project could not proceed and they would be delayed by labor trouble instigated and directed by the defendants" (R. 521-522).

While, as the judge charged, it is the acts of the defendants in causing fear, and not the state of mind of the victim, which is controlling on the issue of guilt under the Hobbs Act (see *United States* v. *Local 807*, 315 U.S. 521), it does not follow that evidence as to the victim's state of mind is irrelevant. In showing that a defendant intended by his threats to cause fear, it is relevant evidence to show that the threats did cause fear. The courts have so held. *United States* v. *Compagna*, 146 F. 2d 524 (C.A. 2), certiorari denied, 324 U.S. 867; *Nick* v. *United States*, 122 F. 2d 660, 671 (C.A. 8), certiorari denied, 314 U.S. 687; *Greater New York Live Poultry C. of C.* v. *United States*, 47 F. 2d 156, 159 (C.A. 2). There was no error in the admission of such evidence.

4. Section 6 of the Norris-LaGuardia Act [4] provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Petitioners' insistence (Pet. 37-38) that the trial court erred in refusing to give their requested instruction No. 14 (R. 538-539) dealing with the foregoing statute reflects only a mistaken attempt to convert this criminal prosecution into a labor dispute. Contrary to the assumption on which this argument rests (Pet. 38), petitioners were not held responsible for any illegal shutdown, nor were they, in the language of the Norris-LaGuardia Act, "held responsible * * * for the unlawful acts of" persons other than themselves. They were charged and convicted for their own threats of injury through unlawful use of their own power for the purpose of extorting money for themselves. In these circumstances, the purpose of the Norris-LaGuardia Act to restrict vicarious liability in labor disputes can have no bearing. There is here no problem of "imputation of guilt for lawless

[4] Act of March 23, 1932, 47 Stat. 71, 29 U.S.C. 106.

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acts done in labor disputes" (*United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 403), but only an accomplished scheme of extortion having no real connection with any labor dispute at all.

It is clear from a reading of the Norris-LaGuardia Act that proof that a person "actually participated" in a lawless act will be sufficient to hold him to account for the acts. In this case all three petitioners actually participated in the extortion charged. Acting in their own interest, they made their demands on the Trojan Construction Company. They made the threats, they collected the money, and they divided it among themselves. The evidence is equally clear that each participated in a conspiracy to violate the Hobbs Act, and that they conspired together as individuals intent on "feathering their own nest"[5] and not as representatives of labor unions furthering the interests of the union members.

5. Each petitioner filed three separate motions under Rule 21(a), F. R. Crim. P., asking for a transfer of his case to another judicial district for trial, and each filed three motions for continuance (R. 30-40, 43-45). In all these motions they claimed that local prejudice had resulted from a report of the Grand Jury and the United States Attorney's office concerning the pending racketeering investigations, released at the time the in-

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[5] Cf. *United States* v. *Compagna*, 146 F. 2d 524, 527 (C.A. 2), certiorari denied, 324 U. S. 867.

dictments were returned on July 23, 1953 (R. 30, 31, 36), from the charges of Judge Moore to the Grand Jurors in November 1953 (R. 33), and from the many newspaper and radio comments directed against racketeering in the area (R. 30, 31, 32, 33, 34). The denial of such motions is now asserted to be prejudicial error (Pet. 39-41).

Neither the court's charges to the grand jurors nor the grand jury reports made any mention of petitioners by name. The news items on the radio and in the newspapers were routine in nature and did no more than report the affairs of the courts. The report of the grand jury was made on July 23, 1953, whereas the trial of petitioners did not commence until February 15, 1954, six and a half months later.

The selection of jurors on the voir dire establishes that petitioners' apprehensions of prejudice were unjustified. The court carefully questioned the jurors regarding any knowledge they might have gained of the case out of court (R. 173-175). Petitioners submitted, and the court asked, additional questions (R. 193), including questions relative to the grand jury report and newspaper accounts (R. 197-198). The record discloses no restriction on petitioners' right to have the jurors examined, nor any refusal of a challenge. The record does not show any information relative to any juror from which could be inferred any concealed prejudice against petitioners.

Rule 21(a), F. R. Crim. P., provides for the transfer of a case to another district or division

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"if the court is satisfied that there exists * * * so great a prejudice against the defendant that he cannot obtain a fair and impartial trial * * *." It clearly lies within the discretion of the trial court to grant or deny motions for change of venue or for indefinite continuance. Until it is shown that the trial court acted arbitrarily or capriciously, its appraisal of the facts and circumstances in determining the best interests of justice should not be disturbed.

Petitioners argue that widespread publicity of itself affords them a basis for seeking a change of venue or obtaining a continuance. Such a rule would make impossible any trial of considerable public interest. *Holt* v. *United States,* 218 U.S. 245. The mere showing that publicity had been given to the matter of racketeering investigations does not of itself warrant a reversal of petitioners' conviction because their motions for continuances were denied. *Allen* v. *United States,* 4 F. 2d 688 (C.A. 7), certiorari denied, 267 U.S. 597; *Shushan* v. *United States,* 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574; *Paschen* v. *United States,* 70 F. 2d 491 (C.A. 7). Even newspaper publicity tending to incite public prejudice is not usually considered a sufficient reason for granting a continuance. *Finnegan* v. *United States,* 204 F. 2d 105 (C.A. 8), certiorari denied, 346 U.S. 821; *Shockley* v. *United States,* 166 F. 2d 704 (C.A. 9), certiorari denied, 334 U.S. 850. There were in this case no circumstances which would justify the conclusion that petitioners could not and did not have a fair trial.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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